Supreme Court, U.S.
FILED
APR 22 1994
OFFICE OF THE CLERK

No. 93-1131

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DEL KIDD AND JUDY KIDD, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Date: April 22, 1994

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ARGUMENT

The government's Brief in Opposition (Opp. Bri.) is clearly designed to deliberately mislead this Court and confuse the issues in an attempt to make this case inappropriately conform to precedent cases cited therein. If it represents the government's strongest arguments, the petition for certiorari shuold be granted.

1. The wording of the government's Question Presented would lead the Court believe that this case involves "adverse personnel action(s)" when, in fact, it does not.[1] Had the personnel actions in this case been adverse, Kidd would have had direct appeal of his claims to the Merit System Protection Board (MSPB) with subsequent access to federal judicial review under the Civil Service Reform Act (CSRA). But that was not the case and this tort action arises specifically *because* such appeal and judicial review is not otherwise available.

Since this case in no way involves adverse personnel actions, any reference made to such actions in the government's brief should be questioned by this Court. And since the appeal of an adverse action is not at issue here, those cases cited in the government's brief that involve appeal of such actions cannot strictly control this case.

2. The Statement portion of the government's brief would lead the Court to believe that the Kidds are nothing but malcontents who filed appeals simply because they were sore looses. In fact, this case reflects the administrative process: each appeal was taken as the law requires or permits in order to exhaust the elaborate remedial scheme established under the

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[1] An adverse action is defined under 5 USC §7512 as a removal, suspension for more than 14 days, reduction in grade, reduction in pay or a furlough for 30 days or less. The personnel actions taken against Del Kidd included administrative leave, a detail, a transfer, and a 14-day suspension - - all of which are alleged to be prohibited personnel practice but none of which constitute an adverse action.

CSRA. And each federal action was filed as the law allows in an attempt to obtain judicial review.

The government's accounting of this case might also lead the Court to believe that the issues presented here were considered and redressed by the MSPB and/or the Office of Special Counsel (OSC). But, as outlined in our Petition for Certiorari (Pet. p. 12-13), the issue before the MSPB was limited exclusively to the question of whether Del Kidd was a whistleblower in relation to his 14-day suspension. The Board refused to hear any other issues. And the OSC chose not to address the tortious conduct of the officials reported to it and alleged in this case.

3. Having thus inaccurately cast this case as one involving adverse personnel actions, the government then cites only adverse action cases and argues that, because the district court's decision does not conflict with any of them and because we cite no decisions that recognize a cause of action in the context of an adverse action, review of this case by this court is unwarranted. (Opp. Bri. pp. 4-5) But, as noted above, this case does not involve the issue of adverse personnel actions. And so, to the extent that the cases cited by the government hinge on that issue, they do conflict with this case.

A review of the cited cases reveals a clear pattern of legal reasoning applied by the courts that creates even further conflicts.[2] In the cases where the employee(s) involved failed to first exhaust the administrative remedy provided under the CSRA before filing tort actions, the courts refused to create a damages

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[2] All of the cited cases involve federal employees who suffered an adverse personnel action and subsequently filed suit in federal court for damages.

remedy *in place of* the one established by Congress.[3] And in the cases where the federal employee(s) had availed themselves of the administrative remedy and had been justly compensated, the courts were unwilling to create a damages remedy *in addition to* those provided under the CSRA.[4] (This pattern is also exhibited in the cases cited later in the government's brief in support of its arguments concerning the constitutional tort or *Bivens* claims)[5] But neither of these legal measures apply in the instant case: Kidd did exhaust the administrative remedy and the government's official wrongdoing was not redressed nor has Kidd in any way been compensated.

In addition, three of these cases are further distinguished from the instant case in that the employees involved were classified as 'non-preference eligible' or 'probationary' or were otherwise 'exempt' and not entitled to the full protection under the

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[3] See: *Morales v. Department of the Army*, 947 F.2d 766 (5th Cir. 1991); *Rollins v. Marsh*, 937 F.2d 134 (5th Cir. 1991); *Schrachta v. Curtis*, 752 F. 2d 1257 (7th Cir. 1985); *American Postal Workers Union v. United States Postal Service*, 940 F.2d 704 (D.C. Cir. 1991); *Berrios v. Department of Army*, 884 F.2d 28 (1st Cir. 1989); *McAuliffe v. Rice* 966 F.2d 979 (5th Cir. 1992); *Ryon v. O'Neil*, 894 F.2d 199 (6th Cir. 1990).

[4] See: *United States v. Fausto*, 484 U.S. 439 (1988); *Premachandra v. United States*, 739 F.2d 392 (8th Cir. 1984).

[5] In four of the six cases cited there, the federal employees had failed to exhaust their remedy under the CSRA and the courts denied tort damages. See: *Berry v. Hollander*, 925 F.2d 311 (9th Cir. 1991); *Hill v. Department of Air Force*, 884 F.2d 1318 (10th Cir. 1990); *Karamanos v. Egger*, 882 F. 2d 447 (9th Cir. 1989); and *Volk v. Hobson*, 866 F.2d 1398 (Fed. Cir.), cert denied, 490 U.S. 1092 (1989) In the other two cases, the federal employee in *Bush v. Lucas*, 462 U.S. 367 (1983) and the social security claimants in *Schweiker v. Chilicky*, 487 U.S. 412 (1989) had been compensated prior to filing tort actions and their claims were denied.

CSRA.

The instant case presents a wholly different set of circumstances. This case alleges that Del Kidd, a career federal employee, was harassed and disciplined in his job. And when he sought redress of his grievances through the appeals process established by the CSRA, the federal officials charged with administering that process willfully violated the very regulations and/or laws that form that process and effectively deprived him of the remedy due him under the law. Furthermore, having exhausted every aspect of the administrative remedy, the official wrongdoing has never been redressed or adjudicated and the system provides no other avenue for judicial review to right the wrong.

We cite no precedents to this case because we have found none. And, obviously, neither has the government. But that does not mean that our claims lack merit or that review by this Court is unwarranted.

4. After attempting to establish the 'general rule' that the Federal Tort Claims Act (FTCA) should never be available to federal employees for their job-related claims, the government argues that to recognize the claims made in the instant case as

> "an exception to the general rule would defeat Congress's purpose to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies ... since there will rarely be a case that cannot be recast to allege a 'failure' of the CSRA system." (Opp. Bri., p. 6, Citings omitted)

The allegations presented in the instant case do not depict the simple failure of the system: they clearly evidence the deliberate *violation* of the system by the very officials charged with administering it. We do claim that the OSC 'failed' to discharge its duty to properly investigate and protect against the prohibited personnel practices exhibited in this case. But the courts and Congress have openly acknowledged that the OSC has failed in this capacity. In *Rivera v. United States*, 924 F.2d 498

(9th Cir. 1991), the Ninth Circuit noted that:

> "The clear intent of the [CSRA] was that the Special Counsel should protect and defend the rights of employees who were the victims of prohibited personnel practices... However, the Special Counsel's view of the role of the Office - - protecting the merit system - - can and has led to instances in which the Special Counsel has acted to the actual detriment of employees seeking help from that Office ... Unless employees have confidence that they will not be hurt by going to the Special Counsel - that the Special Counsel is a safe haven - the Office can never be as effective as Congress intends in protecting victims of prohibited personnel practices. [6]"

In fact, the OSC's poor performance in this regard is, in part, what lead to the enactment of the Whistleblower Protection Act.[7] And one circuit considered the OSC's role in the process so weak that appeal to the Office was not even required to exhaust the CSRA's administrative remedy. *Pope v. Bond*, 613 F. Supp. 708 (D.C.D.C. 1985) (failure to file a complaint with the Office of Special Counsel ... did not constitute failure to exhaust administrative remedies, given largely unreviewable discretion of the Office to compromise or settle complaints or even refuse to pursue a case at all ...).

If there is a 'general rule' here it is exemplified by the courts' unwillingness to create a new damages remedy that would be *in addition to* or *in place of* the remedy provided by the CSRA. And, as noted by the government, "the Tenth Circuit holds out the possibility that a tort claim sufficiently distinct from an adverse personnel action may be brought under the FTCA." Citing: *Petrini v. Howard*, 918 F.2d 1482, 1485 (1990) (per

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[6] See: *Rivera V. U.S.* citing 135 Cong. Rec. S 2782-83 (daily ed. March 16, 1989) (Joint Explanatory Statement).

[7] Ibid.

curiam). (Opp. Bri. p. 6, footnote) We submit that this is just such a case.

5. And finally, the government would have the Court believe that the CSRA should always preclude *Bivens*[8] actions for alleged violations of constitutional rights in connection with federal employment. (Opp. Bri. p. 6) But the government's carefully selected quotes from the *Bush* court failed to include the following:

> "The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation even if Congress has not expressly authorized such a remedy. When Congress provides an alternative remedy, it may indicate its intent that this power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation. *Bush v. Lucas*, 103 S. Ct. 2405 at 2406.

In effect, the government argues that the very existence of the CSRA's elaborate remedial scheme is a factor that should counsel such hesitation. What the government fails to recognize is that law without enforcement is meaningless: if officials of the executive branch are free to violate the CSRA to the detriment of other federal employees, and if neither the remedial system nor the courts provide effective legal recourse, then there is, in effect, no remedy - there is no civil service law within the federal work place - and the federal employees have become the new "Dred Scotts" of this country.

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[8] Constitutional tort claims first recognized by this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)

If the issues presented in this case are not addressed by this Court now, the practical, economic and emotional ramification will be far-reaching. For while this may be the first and only case of its kind to reach the Supreme Court, the abuses alleged in it are commonplace. Failure of this Court to set a clear legal precedent and establish that such abuses will not be tolerated will permit those abuses to continue and will shape the future integrity and efficiency and morale in every corner of the federal work place.

CONCLUSION

Congress passed the Civil Service Reform Act of 1978 "to provide the people of the United States with a competent, honest, and productive Federal work force ..."[9]

The petition for a writ of certiorari should be granted.

Respectfully sumbitted.

Del and Judy Kidd
Petitioners, pro se

April 22, 1994

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[9] Public Law 95-454, 95th Congress, 92 Stat. 1111. October 13, 1978, Section 3.